IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1785

ROBERT GREGORY GROGAN, ET AL.,
Petitioners,

v.

COMMONWEALTH OF KENTUCKY,
Respondent,

and

CITY OF SOUTHGATE, KENTUCKY,
Respondent,

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

A. J. JOLLY
JOLLY, JOHNSON, BLAU & PARRY
30 West Fourth Street
P. O. Box 368
Newport, Kentucky 41072
Attorney for Respondent

CERTIFICATE OF SERVICE:

I hereby certify that three copies of this Brief have been served on Stanley M. Chesley, 1318 Central Trust Tower, Cincinnati, Ohio 45202, Robert F. Stephens, Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601; and Victor Fox, Assistant Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601; and to the Kentucky Supreme Court, on this ..... day of June, 1979.

Attorney for Respondent

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INDEX

CITATIONS

FEDERAL CONSTITUTIONAL PROVISIONS

FEDERAL STATUTES

STATE STATUTES

MISCELLANEOUS

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COUNTERSTATEMENT OF THE CASE

The Respondent, City of Southgate, is compelled to restate the case by virtue of the fact that the Petitioners base their statement on a document entitled "Investigative Report."

This report, contrary to Petitioners' statement, was not introduced in the appeal to the Supreme Court of Kentucky and we know of no basis under the Kentucky Rules of Procedure which would have so permitted its introduction. We are further compelled to point out that

this report, which we respectfully suggest, should be ignored by this Court, was authored by one Ovid Lewis, the same Ovid Lewis, we presume, who is listed as of counsel by Petitioners.

The fact is that this matter was submitted to the Supreme Court of Kentucky for determination upon an agreed statement of the case made pursuant to Kentucky Rules of Civil Procedure, R 75.15. A copy of the statement which was filed with, and which constituted the complete record before the Kentucky Supreme Court is appended hereto as Appendix A.

It was agreed and stipulated therein that the following allegations against the Respondent, City of Southgate, were representatives of all of those made in the various complaints and it was stipulated and agreed that the Supreme Court of Kentucky would decide the appeal as if the following were the allegations in all of the cases before it, *in haec verba*:

> "That the defendant, the Commonwealth of Kentucky, and the defendant, the City of Southgate, had duties mandated by statute of enforcement of regulations with regard to the construction, design, maintenance, fireproofing, firefighting, exiting, and crowd control of all public buildings within the Commonwealth of Kentucky and the City of Southgate, and as such they owed certain duties to the plaintiffs, that they breached in that they:
>
> a. Failed to establish and/or enforce occupancy limits;
>
> b. Failed to properly supervise and inspect the construction of the Beverly Hills Supper Club;
>
> c. Improperly approved for construction the plans submitted by the defendants for the construction of the Beverly Hills Supper Club.
>
> d. Failed to conduct periodic fire inspections;

> e. Failed to cite violations of existing statutes, codes, ordinances, and regulations of the Commonwealth of Kentucky or the City of Southgate, pertaining to regulations, or enforce same;
>
> f. Failed to provide adequate firefighting equipment and personnel;
>
> g. Permitted the defendants to operate a public building when they knew, or should have known, that said building presented a serious hazard of fire with resulting loss of life;
>
> h. Failed to heed warnings of individuals with regard to existence of violations of building codes and fire regulations; all of which was the direct and proximate cause of plaintiffs' and their decedents' injuries and deaths as is hereinafter stated."

It was further stipulated that the Respondent City had filed answers and motion for judgments on the pleadings and it was stipulated and agreed that the answers and motions appended to the agreed statement were typical of all the motions and answers filed in the several cases and are attached as Appendix B1.

It was further stipulated therein that the Campbell Circuit Court (the Kentucky Trial Court) had entered the judgment appealed from, and which judgment had sustained the motion of the City. A copy of the Trial Court's Order is attached as Appendix C.

Following the submission of the Agreed Statement of the case pursuant to Kentucky Rules of Civil Procedure, R 75.15, the matter was briefed to and argued orally before the Supreme Court of Kentucky.

The Supreme Court of Kentucky sustained the Trial Court, holding simply that the Petitioners failed to state facts sufficient to constitute a cause of action under the common law of the State of Kentucky. The decision was based on the fundamental principle of tort law that ac-

tionable negligence is the existence of a duty owed by the person charged with negligence to the person injured. The Court rightfully held that a governmental unit in the enactment of laws designed to protect the public does not itself attempt to perform the task, but only attempts to compel others to do so, and that therefore it owes no actionable duty to individuals who are injured because its servants fail to enforce those laws. A copy of the Supreme Court's opinion is attached as Appendix D.

I.

THE DECISION BELOW DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

This Court has no jurisdiction to review a judgment from a State Supreme Court unless that judgment presents a substantial federal question. 28 USC § 1257 (3); *Fox Film Corporation* v. *Muller,* 296 US 207 (1935). Further, by this Court's own rules, a writ of certiorari will only be granted where the state court has decided a previously undetermined substantial federal question or has decided it in discord with this Court's applicable decisions. Rule 19 (a), Rules of the Supreme Court.

This case does not present such questions. The Kentucky Supreme Court's affirmance below of the dismissal on the pleadings rests on the substantive law of the State of Kentucky. Based on the holding of *Louisville* v. *Louisville Seed Company,* 433 SW 2d 638 (Ky. 1968), among other Commonwealth precedent, the Court below simply held that the alleged failure of the governmental officers and employees to perform an inspection function

does not constitute a tort committed against any individual citizen.

Questions of duty, breach of duty and negligence theory are, of course, state law questions. The holding of the Court below merely affirms the general negligence rule that no cause of action may be brought based on a breach of a duty owed to some other person or entity or based on a duty owed to no one at all. This is the substantive law of the Commonwealth, as it is in a number of other states. See *Modlin* v. *City of Miami Beach,* 201 So 2d 70 (Fla. 1967). Since the plaintiffs below failed to premise their complaints on an essential element required in the Commonwealth for a negligence cause of action (a duty owed on the part of the defendants running to the plaintiffs), the dismissal is based wholly on a question of state tort law and presents no substantial federal question.

The fact that the Court below addressed Petitioners' constitutionally based due process and equal protection arguments and opined that the plaintiffs' rights were not being violated, did not necessarily confer jurisdiction upon this Court. A state court decision resting upon federal as well as non-federal grounds is not reviewable if the non-federal ground is independent and is itself adequate to support the judgment. *Fay* v. *Noia,* 372 US 391 (1963); *Jankovich* v. *Indiana Toll Road Comm.,* 379 US 487 (1965).

The decision below, based on the failure to satisfy at least the threshold element (a duty owed) required under the Commonwealth's substantive tort law is clearly an independent and adequate non-federal ground to sustain this judgment.

This Court has a constitutionally mandated history of deferring to ". . . State substantive grounds so long as

they are not patently evasive of or discriminatory against federal rights . . ." *Fay* v. *Noia, supra* at 432. The *per curiam* opinion of the Supreme Court of Kentucky as that opinion relates to the Respondent, City of Southgate, makes no significant reference to a federal constitutional question.

II.

ESTABLISHMENT OF A POLICY BY THE SUPREME COURT OF KENTUCKY LIMITING ACTIONABLE DUTY DOES NOT VIOLATE PETITIONERS' CONSTITUTIONAL RIGHTS SO AS TO PRESENT A SUBSTANTIAL FEDERAL QUESTION.

A.

The Commonwealth's Public Duty Doctrine rests on legitimate public policy.

The Petitioners allude in their petition that the "public duty doctrine" is merely a form of unlegislated sovereign-type immunity, and, indeed, they raise the same constitutional objections to this tort doctrine as has previously been argued before this Court, and elsewhere, in opposition to sovereign immunity.

This Court has so consistently rejected these arguments with regard to sovereign immunity, that it is hardly logical that the equally well established and arguably less restrictive public duty doctrine should be found federally offensive. Twice recently this Court has dismissed for lack of substantial federal question two challenges to state sovereign immunity. *See Krause* v. *Ohio,* 409 US

1052 (1972); *Huffman* v. *Kentucky,* 98 S.Ct. 1641 (1978); and denied certiorari in another, *Berry* v. *Hinds County, Mississippi,* 344 So. 2d 146 (Miss. 1977), cert. denied 434 US 831.

The Petitioners offer no compelling reason why this Court should hear the merits regarding the public duty doctrine when this Court clearly would decline to do so, if the issue were sovereign immunity, except to assert that Respondents may not "fall back on" the policy support underlying sovereign immunity. (Pet. Brief, p. 11). This is a fallacious assertion since to reject the similarity of policies between the two, ignores the genesis and impetus behind the public duty doctrine. Each state court has a right and duty to establish its own public policy.

Just as most common law doctrines are a reflection of the society which formed them, the concept of duty reflects the policies behind the law of negligence. Thus,

> ". . . it should be recognized that 'duty' is not sacrosanct in itself, but only as expression of the sum total of those considerations of policy which lead the law to say that a particular plaintiff is entitled to protection." W. Prosser, *Law of Torts,* pp. 332-333) (3d ed. 1969).

This reasoning is also explicit in Justice Cardoza's opinion in *Moch* v. *Rensselear,* 247 NY 160, 159 NE 896 (1928) one of the early cases delineating the public duty doctrine and whose holding reflects his belief for municipal defendants.

Hence, since the line between duty owed and no duty owed as to any given plaintiff must be drawn in accord with policy, and the Commonwealth of Kentucky has expressed its policy in the adoption and adherence to the public duty doctrine to protect governmental units from

potentially inhibiting and ruinious liability, the Respondent respectfully submits that there is no *new* constitutional question raised by the decision below and certainly not one decided contrary to this Court's applicable cases.

B.

Petitioners were not denied equal protection and due process of law.

Although the Petitioners allege that the ruling below violates their due process and equal protection rights, this again is an argument which this Court has rejected regarding sovereign immunity, *Krause, supra, Huffman, supra,* and *Berry, supra,* and again Petitioners offer no compelling reason why the public duty doctrine is uniquely offensive to the Fourteenth Amendment.

Respondents here dispute that a class is created by the ruling below—in fact all plaintiffs similarily situated are similarily treated. However, since it is constitutionally permissable to differentiate at law between things which are different in fact and to thus provide different remedies, *Tigner* v. *Texas,* 310 US 141 (1940), if this class exists, it is not violative of the Fourteenth Amendment.

In asserting the existence of this deprived class, the Petitioners have necessarily assumed that "but for" the public duty doctrine Respondents would be liable to the Petitioners. However there is *no* analogy to the liability of a private tortfeasor, since no non-governmental unit could ever be in Respondents' position. And further, there is simply no precedent for holding a public body liable for any citizen's violations of its public laws.

C.

Petitioners were not denied access to the courts.

The Petitioners further assert that the ruling below denies them their First Amendment right to free access to the courts and rely on this Court's holding in *Boddie* v. *Connecticut,* 401 US 371 (1971).

The suit in *Boddie* was a class action instituted on behalf of indigents unable to obtain divorces since they could not pay court fees. This Court held the filing fee requirement impermissably denied the Plaintiffs access to the courts. This decision is clearly distinguishable in that the indigents seeking divorce were completely denied their right to be heard. The Petitioners here cannot reasonably maintain that their position is comparable to *Boddie* since the dismassal of governmental entities by the courts below was not a complete denial of access to the courts. The Petitioners have already had their day in court and merely desire now to relitigate their claims.

Petitioners complain that the dismissal of their case without a hearing on the merits denies them due process of law. "Due process does not require that a defendant in every civil case actually have a hearing on the merits." *Valley Bank of Nevada* v. *Skeen,* 366 F. Supp. 95, 98 (N.D. Texas 1973). We suggest that if the Petitioners had facts to offer other than those set forth in the stipulated allegations, (see pp. 2-3) that they could and should have availed themselves of the opportunities presented by the Kentucky Rules of Civil Procedure, R 15.03 and amended their complaint prior to this appeal.

CONCLUSION

The substantive law of Kentucky which holds that there must be an actionable duty running from the City to the person injured as a condition to recovery does not present a substantial federal constitutional question nor violate Petitioners constitutional rights, and therefore, the writ should not issue.

Respectfully submitted,

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Newport, Kentucky 41072

ATTORNEY FOR RESPONDENT,
City of Southgate

APPENDIX A

SUPREME COURT OF KENTUCKY

SC-618-T

ROBERT GREGORY GROGAN,
Co-Administrator of Estate of
Donnie Clyde Grogan, Deceased, et al.,
Appellants,

vs.

COMMONWEALTH OF KENTUCKY,
Appellee.

STATEMENT OF THE CASE PURSUANT TO CR 75.15

(Filed May 24, 1978)

Come all parties herein and, pursuant to CR 75.15, do stipulate and agree that this agreed statement of the case, subject to the approval of the Campbell Circuit Court and this court, shall be certified to this court as the record on appeal herein in lieu of the record as specified in CR 75.07. Said statement is as follows:

1. On or about May 28, 1977, the Beverly Hills Supper Club located in Southgate, Campbell County, Kentucky, caught fire about 9:00 p.m. and burned to the ground. At the time of this stipulation approximately 165 deaths have resulted from this fire and an unknown

number of injuries, estimated at about 100, of varying degrees of seriousness, have also resulted.

2. Shortly after the fire suits began to be filed in the Circuit Court of Campbell County, Kentucky and the United States District Court for the Eastern District of Kentucky at Covington. The Commonwealth of Kentucky was named as a defendant in all of these suits.

3. The complaints in cases number 13862, Gary W. Ellison, Administrator of the Estate of Elmer Lee Ellison v. 4-R Corporation, et al. and case number 13994, John Gripshover and Eugene Gripshover, Co-Executors and Trustees of the Estate of Clarence F. Gripshover v. 4-R Corporation, et al. have been stipulated and agreed by the parties as being representative of all of the complaints in these actions with regard to the allegations concerning the Commonwealth of Kentucky. Copies of these complaints are attached hereto as Exhibits "A" and "B" respectfully.[1]

4. All actions filed in the Campbell Circuit Court were consolidated at the time of the proceedings hereinafter referred to.

5. Because of the numerous plaintiffs' attorneys involved in this litigation, the Circuit Court, acting pursuant to CR 16, using the federal "Manual for Complex Litigation" as a guideline appointed a Lead Counsel Committee, which has been authorized to represent all of the plaintiffs in these cases on this appeal. William O. Bertelsman, Bertelsman & Bertelsman, P.S.C., 303 Lawyers Building, Newport, Kentucky, has been designated by the Lead Counsel Committee as the attorney principally in charge of this appeal. The names of the Lead Counsel Committee appear at the end of this stipulation.

[1] Only the pertinent portions of these exhibits are included.

6. The Commonwealth of Kentucky filed motions to dismiss in all of the consolidated cases. Its motion in case number 13862 is attached hereto as Exhibit "C,"[2] and is agreed and stipulated to be typical of all of the motions filed in all of the cases.

7. On or about October 17, 1977, an oral hearing and argument was held in the courtroom of the Campbell Circuit Court at Newport, Kentucky, at which Honorable John Diskin, Judge of that court, and Honorable Carl Rubin, United States District Judge for the Southern District of Ohio sitting by designation in the Eastern District of Kentucky, jointly heard oral arguments on the motions to dismiss of the Commonwealth. A transcript of that oral argument is attached hereto as Exhibit "D"[3] and stipulated as accurate.

8. On or about November 18, 1977, the Campbell Circuit Court entered the judgment appealed from, which was styled Opinion and Order and sustained the motion of the Commonwealth. A copy thereof appears as Exhibit "E."

9. On or about December 7, 1977, the Lead Counsel Committe on behalf of all plaintiffs who were before the court at the time of the entry of the said opinion and order filed a joint notice of appeal therefrom, a copy of which is attached hereto as Exhibit "F."[4]

10. On or about December 29, 1977, the Campbell Circuit Court entered an order correcting clerical errors in the joint notice of appeal. No objection is made to

[2] Exhibit omitted.

[3] Exhibit omitted.

[4] Exhibit omitted.

these corrections. A copy of said order is attached hereto as Exhibit "G."[3]

11. Subsequent to the above events, additional actions have been filed in the Campbell Circuit Court, and the litigation therein has been certified as a class action. Although the Commonwealth has filed similar motions to those included in this stipulation in these subsequent actions, no ruling has as yet been made thereon.

12. Subsequent to the oral argument of October 17, 1977, the United States District Court dismissed the Commonwealth from the litigation therein pending on the ground that it had no jurisdiction over the said Commonwealth in that it was not a citizen of any state for diversity purposes. Although requested to do so, the judge of the federal court declined to certify said ruling as a final appealable order.

13. The appellants rely herein on the following points.

a) The doctrine of sovereign immunity on the basis of which the actions against the Commonwealth of Kentucky and the court below were dismissed, is inequitable and unjust under general principles of law and ought to be abandoned as a law of this Commonwealth by this court.

b) The doctrine of soverign immunity is unconstitutional as a denial of equal protection and due process under the Fourteenth Amendment to the Constitution of the United States, and is further an exercise of unreasonable and arbitrary power under Article II of the Constitution of this Commonwealth.

These points are opposed by the Commonwealth.

---

[3] Exhibit omitted.

14. The parties hereto agree that this agreed statement with attached exhibits may constitute the entire record on appeal herein, and that no docket sheets or other portions of the records of the various cases filed in the circuit court are necessary for this appeal.

/s/ VICTOR FOX
Assistant Attorney General
Capitol Building
Frankfort, Kentucky

/s/ WILLIAM O. BERTELSMAN
303 Lawyers Building
Newport, Kentucky 41071

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Thomas C. Spraul
Gene Mesh
Philip Taliaferro
Larry C. West
J. Gregory Wehrman
William T. Robinson
Lanny R. Holbrook

APPROVED:

/s/ JOHN A. DISKIN
Judge of the Campbell Circuit Court.
May 19, 1978.

APPENDIX B1

CAMPBELL CIRCUIT COURT
DIVISION NO. TWO

CASE NO. 13858

ROBERT GREGORY GROGAN,
Co-Administrator of the Estate of
Donnie Clyde Grogan, Deceased, et al.,
Plaintiffs,

vs.

IV-R CORPORATION, ET AL.,
Defendants.

ANSWER OF DEFENDANT, CITY OF SOUTHGATE, KENTUCKY

(Filed July 11, 1977)

Defendant, City of Southgate, Kentucky, for answer herein to the Complaint of Plaintiff including all counts therein set forth, says as follows:

FIRST DEFENSE

That said Complaint and all counts therein set forth do not state facts sufficient to constitute or support a cause of action against this Defendant.

SECOND DEFENSE

As to so much of the Complaint filed as designated in first cause of action, this answering Defendant says it has not sufficient information upon which to form or base a belief and, therefore, neither affirms or denies numerical paragraphs 1, 2, 3, 4, 5, and 6 thereof.

THIRD DEFENSE

As to so much of the Complaint filed as designated in second cause of action, Defendant says it has not sufficient information upon which to form or base a belief and, therefore, neither affirms or denies numerical paragraphs 7 and 8 including those paragraphs incorporated by reference in paragraph 7.

FOURTH DEFENSE

As to so much of the Complaint filed as designated in the third cause of action, Defendant says it has not sufficient information upon which to form or base a belief and, therefore, denies the allegations contained in numerical paragraphs 9 and 10 including those paragraphs incorporated by reference in numerical paragraph 9.

FIFTH DEFENSE

As to so much of the Complaint filed as designated in the fourth cause of action, this answering Defendant says it has not sufficient information upon which to form or base a belief and, therefore, neither affirms or denies numerical paragraphs 11 and 12 including those allegations incorporated by reference in numerical paragraph 11.

SIXTH DEFENSE

As to so much of the Complaint filed as designated in

the fifth cause of action, this answering Defendant denies the allegations of numerical paragraphs 13 and 14, and specifically denies the unnumbered paragraphs set forth in the fifth cause of action.

SEVENTH DEFENSE

Defendant denies the allegations of numerical paragraphs 15 and 16, including those allegations incorporated by reference as they relate to this answering Defendant.

EIGHTH DEFENSE

For its eighth defense, the Defendant, City of Southgate, denies that it had the duty to enforce regulations with regard to the construction, design, maintenance, fireproofing, firefighting, existing and fire control of all public buildings within the City of Southgate as alleged in the Complaint, and it denies that it owed duties to Plaintiffs' decedent as set forth in said Complaint or any duty whatsoever.

As an affirmative defense, it states that the duties described in said Complaint were not breached in that the performance of the duties alleged therein would each be an inherent part of carrying out the functions of municipal government and that even if said duties were to exist, which Defendant, City of Southgate, denies, the same or any of said duties would not translate into a duty to certain members of the public and that in particular it owed no duty to Plaintiffs' decedent.

NINTH DEFENSE

For its further defense, the Defendant, City of Southgate, says that if the Plaintiffs' decedent, Donnie Clyde Grogan, died at the time, place and manner set forth in the Complaint filed that said death came and was brought

about through the negligence and carelessness of Plaintiffs' decedent himself occurring at said time and place, this answering Defendant being without negligence.

WHEREFORE, Defendant, City of Southgate, Kentucky, demands:

1. That the Complaint of Plaintiffs be dismissed.
2. All costs herein incurred.
3. All proper relief.

A. J. JOLLY
and
ALBERT H. ROOT of
JOLLY, JOHNSON, BLAU & PARRY
Attorneys for Defendant,
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[CERTIFICATE OF SERVICE OMMITTED]

APPENDIX B2

CAMPBELL CIRCUIT COURT
DIVISION NO. TWO

CASE NO. 78-CI-266

JONATHAN A. MASON, Ancillary Administrator
of the Estate of Robert E. Sykes, Deceased,
Plaintiff,

vs.

IV-R CORPORATION, ET AL.,
Defendants.

MOTION ON BEHALF OF CITY OF SOUTHGATE TO DISMISS

Comes now the Defendant, City of Southgate, and moves the Court as follows:

1. That said Complaint be dismissed and the Plaintiff be required to adopt the Master Class Action Complaint filed herein in a case styled "Mark G. Arnzen, et al., etc. vs. 4-R Corporation, et al" and numbered 14003 on the dockets of this Court.

2. For judgment on the pleadings dismissing this Complaint as to the Defendant, City of Southgate pursuant to Rule 12 (3) of the Rules of Civil Procedure, in conformity with the Court's Order dated November 29, 1977,

and which Order is applicable to all cases styled "in Re: Beverly Hills Fire Litigation."

A. J. JOLLY of
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NOTICE

Please take notice that the within Motion will come on for hearing at the convenience of the Court.

[CERTIFICATE OF SERVICE OMITTED]

APPENDIX C

TRIAL COURT ORDER DISMISSING CITY OF SOUTHGATE

COMMONWEALTH OF KENTUCKY,
CAMPBELL CIRCUIT COURT
DIVISION NO. ONE

IN RE:

BEVERLY HILLS FIRE LITIGATION
This Document Relates to All Actions

ORDER AND JUDGMENT

(Filed November 29, 1977)

Upon motion of the City of Southgate, Kentucky, defendant herein, for judgment on the pleadings pursuant to Civil Rule 12.03, and dismissal of these actions as to this defendant, the Court having considered the record herein, memoranda of law submitted by the parties, having heard oral argument and being otherwise sufficiently and duly advised, it is hereby

ORDERED AND ADJUDGED that the aforesaid motion of the City of Southgate be sustained, and the same are hereby dismissed as to the Defendant, City of Southgate, Kentucky, by virtue of the decisions of the Supreme Court of Kentucky in *Frankfort Variety, Inc., et al,* v. *City of Frankfort, Kentucky* (KY, 1977) 552 S. W. 2d, 653 and

City of Louisville v. *Louisville Seed Company* (KY, 1968) 433 S. W. 2d 638, and the cases, reasoning and authority cited therein.

This is a final Judgment and there is no just reason for delay.

This the 29th day of November, 1977.

/s/ JOHN A. DISKIN,
Judge

APPENDIX D

OPINION OF THE SUPREME COURT OF KENTUCKY ISSUED JANUARY 16, 1979

SUPREME COURT OF KENTUCKY

SC-618-TG
ROBERT GREGORY GROGAN, CO-ADMINISTRATOR OF ESTATE OF DONNIE CLYDE GROGAN, DECEASED, ET AL.
APPELLANTS

vs.

COMMONWEALTH OF KENTUCKY,
APPELLEE

78-SC-195-TG
ROBERT GREGORY GROGAN, CO-ADMINISTRATOR OF ESTATE OF DONNIE CLYDE GROGAN, DECEASED, ET AL.,
APPELLANTS

vs.

CITY OF SOUTHGATE, KENTUCKY,
APPELLEE

Appeal From Campbell Circuit Court
Hon. John A. Diskin, Judge
No. 13858

PER CURIAM

AFFIRMING

On May 28, 1977, a fire at the Beverly Hills Supper Club in the City of Southgate, Kentucky, resulted in a great number of deaths and personal injuries. Shortly thereafter numerous injured parties and personal representatives of those who had lost their lives filed damage suits in the Campbell Circuit Court. In all of these actions, which in due course were consolidated, the City of Southgate and the Commonwealth of Kentucky were named as defendants. The plaintiffs now appeal from separate judgments dismissing the actions, on the pleadings, as to the city and the Commonwealth. Each of the two appeals is submitted on an agreed statement under CR 75.15 and has been briefed and argued accordingly.

We shall discuss the city case first, because its resolution disposes of the Commonwealth case without requiring consideration of the sovereign-immunity question.

It was settled in Haney v. City of Lexington, Ky., 386 SW 2d 738, 742 (1964), that the doctrine of sovereign immunity no longer protects municipal corporations in this state from tort liability. Later, however, in City of Louisville v. Louisville Seed Company, Ky., 433 SW 2d 638 (1968), it was made clear that cities are different creatures from natural persons, private corporations, and other suable entities, and that the fundamental bases for tort liability are not necessarily the same for all of them in all situations.

As observed in Frankfort Variety, Inc. v. City of Frankfort, Ky., 552 SW 2d 653, 655 (1977), our most recent opinion on the subject, "a city's relationship to individuals and to the public is not the same as if the city itself were a private individual or corporation, and its duties are not

the same. When it undertakes measures for the protection of its citizens, it is not to be held to the same standards of performance that would be required of a professional organization hired to do the job. If it were, it very well might hesitate to undertake them. . . . A city cannot be held liable for its omission to do all the things that could or should have been done in an effort to protect life and property."

Broadly speaking, the theory on which the city's liability is premised is that it failed to enforce laws and regulations, including its own, establishing safety standards for the construction and use of buildings within its corporate limits, and that its failures in this respect were a substantial factor in causing the tragedy. In other words, the charge is that the city did not enforce a law or laws designed for the safety of the public and that its taxpayers must therefore bear a loss occasioned by someone else's failure to comply with the law.

Though appellants indulge the facile assumption that under similar circumstances a private individual would be liable at common law, we do not believe that the common law, as applied to individuals, offers any reasonably comparable analogy. There is, of course, the familiar principle that one who undertakes the care of another, or of his property, even though it be voluntary and without consideration, owes him the duty of reasonable care. But in the enactment of laws designed for the public safety a governmental unit does not undertake to perform the task; it attempts only to compel others to do it, and as one of the means of enforcing that purpose it may direct its officers and employes to perform an inspection function. The failure of its officers and employes to perform that function "does not constitute a tort committed against an individual who may incidentally suffer injury or damage, in common with others, by reason of such

default." City of Russellville v. Greer, Ky., 440 SW 2d 269, 271 (1969). The law that applies to this case has been carefully considered, clearly enunciated, and firmly settled in City of Louisville v. Louisville Seed Company, Ky., 433 SW 2d 638 (1968); City of Russellville v. Greer, Ky., 440 SW 2d 269, 271 (1969); and Frankfort Variety, Inc. v. City of Frankfort, Ky., 552 SW 2d 653, 655 (1977). These precedents do not restore the doctrine of sovereign immunity, nor do they evince a retreat toward it. Haney v. City of Lexington, Ky., 386 SW 2d 738, 742 (1964), erased the arbitrary distinction between governmental and proprietary activities, thus extending a city's exposure to tort liability into the realm of "governmental functions," but it did not purport to create new torts. As it happens, the existence of the sovereign-immunity doctrine served to prevent a normal development of common-law tort principles in the field of municipal liability until recent times, and the subject cannot reasonably be covered by fitting it out with a ready-made suit of clothes borrowed from the law of torts as it applies to individuals and private corporations. They simply are not the same animals.

In Modlin v. City of Miami Beach, Fla., 201 So.2d 70 (1967), a shopper in a retail store was killed when an overhead storage mezzanine collapsed upon her. In a wrongful-death suit against the city in which the store was located the complaint alleged negligent inspection by the city during construction of the building. Conceding that the residue of municipal immunity theretofore retained in an earlier opinion did not apply, a divided court nevertheless held that there was no tort liability: "It is a well recognized principle of tort law that a fundamental element of actionable negligence is the existence of a duty owed by the person charged with negligence to the person injured. . . . However, there is also a doctrine of

respectable lineage that holds that this duty must be something more than the duty that a public officer owes to the public generally . . . . It is evident that under this principle the respondent city's inspector would not have been personally liable . . . . Therefore, the city is not liable under the rule of respondeat superior." *Id,* at 201 So. 2d 75, 76.

We cite this line of reasoning by the Florida court not because we find it a satisfactory answer, but in order to illustrate that even by resort to common-law logic the appellants have no case against the city. We acknowledge, however, that a legal problem of this magnitude should not be resolved by the tricks of mechanical logic. The answer must find its source in conscious public policy, and the fundamental policy-viewpoint on which this court has settled during the 15 years since Haney v. City of Lexington, Ky., 386 SW 2d 738 (1964), is that a government ought to be free to enact laws for the public protection without thereby exposing its supporting taxpayers (including, of course, those yet unborn) to liability for failures of omission in its attempt to enforce them. It is better to have such laws, even haphazardly enforced, than not to have them at all.

What we have said thus far with regard to the city's responsibility applies with equal force to the Commonwealth. There being no basis for tort liability, the question of governmental immunity becomes irrelevant. The answer to the argument that federal constitutional rights are violated by any result that has the effect of shielding governmental bodies from liability that would attach except for their status is that the principles articulated in our previous cases and applied here do not have that effect. To the contray, that status would be the only basis *for* holding a city or state liable, because only a governmental entity possesses the authority to enact and enforce laws for the protection of the public. Hence it is that in delineating the areas and extent of public responsibility we are dealing with a subject quite apart and different from the world of individual and corporate relationships. There being no reasonable basis for comparison, there can be no discrimination.

The judgments are affirmed.

All concur.